85-1553 (2)

No. 85-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Petitioner,

—against—

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, and LUCILLE WILLIAMS, City Clerk of the City of Clearwater,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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March 1986

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APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3232

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellee,

- against -

CITY OF CLEARWATER, ET AL.,

Defendants-Appellants.

No. 84-3236

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, ET AL.,

Plaintiffs-Appellees,

- against -

CITY OF CLEARWATER, FLORIDA ETC., ET AL.,

Defendants-Appellants.

**Nos. 84-3543, 84-3544,
84-3545, 84-3546,
85-3574**

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellant,

- against -

CITY OF CLEARWATER, ET AL.,

Defendants-Appellees.

No. 84-3575

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL.,

Plaintiffs-Appellants,

- against -

CITY OF CLEARWATER, FLORIDA, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

(November 13, 1985)

Before TJOFLAT and KRAVITCH, Circuit Judges, and DUMBAULD*, District Judge.

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* Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

TJOFLAT, Circuit Judge:

These consolidated appeals involve challenges brought by two separate plaintiff groups to the constitutionality of a repealed City of Clearwater, Florida ordinance and its successor ordinance, both of which regulated charitable solicitation.1/ The district court

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1/ The plaintiffs' challenges were brought pursuant to 42 U.S.C. § 1983 (1982), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(footnote continued)

declared the first ordinance unconstitutional and permanently enjoined its enforcement. The district court declared the second ordinance facially constitutional and certified the issue to this court for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982).

We vacate the district court's first decision for want of a case or controversy. We decline to pass on its second decision because leave to appeal pursuant to section 1292(b) was improvidently granted.

(footnote continued from previous page)

The district court's jurisdiction over these claims was conferred by 28 U.S.C. § 1331 (1982) and 28 U.S.C. § 1343(a)(3) (1982).

I.

A.

On October 6, 1983, the City of Clearwater enacted Ordinance No. 3091-83 which sought to regulate charitable solicitations. The ordinance required charitable organizations that wished to solicit funds in Clearwater to register with the City, maintain certain records, disclose the sources and uses of their contributions, refrain from engaging in fraudulent solicitation practices, and submit to an investigation by the City Attorney on the complaint of ten or more individuals. The operative provisions of the ordinance were to become effective on January 31, 1984.

Americans United for Separation of Church and State and several other named plaintiffs (collectively "Americans United") brought a ten-count action in the district court on January 20, 1984 to enjoin the City and its officers from enforcing the ordinance. Each count raised a discrete constitutional claim.[2/] On January 23, the Church of Scientology Flag Service Organization, Inc. ("Church of Scientology") brought a separate twelve-count action for injunctive relief on grounds similar to those raised by

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2/ Americans United alleged that the ordinance violated the due process and equal protection clauses of the fourteenth amendment; the free speech, free press, free exercise and establishment of religion clauses of the first amendment; the commerce clause; and the right to privacy guaranteed by the first, fourth, fifth, and ninth amendments.

Americans United.[3] Both plaintiffs moved the court for a temporary restraining order pursuant to Fed. R. Civ. P. 65(b); such an order became unnecessary, however, when the City agreed not to enforce the ordinance pending a final determination on the merits.

The court scheduled a final hearing on the plaintiff's prayers for a permanent injunction[4] on March 9, 1984. At the hearing, the parties requested the court to limit the scope of the hearing

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[3] The district court took no formal action on the City's motion to consolidate the two cases. It therefore entered duplicate orders whenever an issue arose common to both cases.

[4] The plaintiffs prayed for preliminary and permanent injunctive relief. Fed. R. Civ. P. 65(a)(2) authorized the court to consolidate their application for a preliminary injunction with the trial of the action on the merits.

to the facial validity of the ordinance and defer to a subsequent hearing its decision on the plaintiffs' claims that the ordinance was unconstitutional as applied. The court granted the parties' request and confined the hearing to the facial constitutionality of the ordinance. The parties presented no evidence save a brief stipulation between the Church of Scientology and the City. They stipulated to the existence of the ordinance, that the City was a municipality of the state, that the Church of Scientology was a Florida corporation, and that it sells books and pamphlets and pays some Scientologists commissions on funds they solicit. These parties also stipulated that the court had subject matter jurisdiction over their case and

that venue was proper. Finally, the City advised the court that it would not challenge the Church of Scientology's standing to bring the suit, except as to those claims alleging that the ordinance violated the freedom of religion clauses of the first amendment.

Americans United and the City stipulated to nothing. On the standing issue, the City maintained an inconsistent position. The City advised the court that it would not contest any of the Americans United plaintiffs' standing to sue; at the same time, the City said it reserved the right to challenge the standing of any of such plaintiffs to prosecute any of their claims. The court did not resolve this inconsistency.

After entertaining argument from counsel on the facial validity of the ordinance, the court directed counsel to file post-hearing memorandums by March 16. On March 15, the City Commission enacted an emergency ordinance, No. 3479-84, as an amendment to Ordinance No. 3091-83. The amended ordinance consisted of a comprehensive scheme to regulate charitable solicitation, making substantial modifications to Ordinance No. 3091-83. It provided for the repeal of any conflicting ordinance, thereby effectively repealing Ordinance No. 3091-83. As an emergency ordinance, it would have automatically expired at the

end of ninety days, if not passed as a non-emergency ordinance within that time.5/

The City promptly notified the district court and the plaintiffs' counsel of the amended ordinance. Rather than allowing the plaintiffs to amend their complaints and adjudicate the validity of the new ordinance, the district court, on March 28, proceeded to determine the facial validity of repealed Ordinance No. 3091-83. Without specifying which of the several counts of the plaintiffs' complaints it was deciding, the court declared the repealed ordinance unconstitutional and permanently enjoined

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5/ The emergency ordinance explicitly provided for its expiration in 90 days. The Clearwater City Charter also mandated a 90-day expiration period for emergency ordinances.

its application and enforcement. The court held that the ordinance was overly burdensome of first amendment rights, given the legitimate state interest involved, and was also impermissibly vague and discriminatory.

The court justified its jurisdiction to adjudicate the validity of the repealed ordinance on two grounds. First, a finding of no jurisdiction would encourage cities to enact laws affecting the constitutional rights of its citizens and, if challenged in court, simply amend such laws, thereby prolonging the period of uncertainty as to citizens' rights. Second, the court, noting the large number of cases pending on its docket, stated that it could not permit the litigants to delay the completion of

their cases by amending their pleadings at the eleventh-hour and thereby occupy "someone else's day" in court. Accordingly, an immediate decision terminating the instant cases was mandated. The court terminated the Americans United case by granting the injunctive relief sought and "dismissing" the case.6/ The

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6/ As we indicate in the text supra, Americans United's complaint contained 10 counts. The district court's dispositive order, however, did not indicate the count or counts on which the court granted relief. We do know that the court did not adjudicate the counts alleging that the ordinance was unconstitutional as applied. As to these counts, the dispositive order dismissing the case is open to two interpretations: the court either dismissed them with prejudice, i.e., on the merits, or without prejudice, meaning that the plaintiffs could refile their suit if the district court's order was reversed on appeal. The problem such an order presents a litigant occupying Americans United's position is that it must cross appeal from the district court's disposition of the dismissed counts. If
(footnote continued)

court similarly terminated the Church of Scientology case, granting the relief sought and dismissing eleven of the twelve counts of the plaintiff's complaint.7/ The court's dispositive order failed to dispose of the twelfth count, however. Consequently, the court retained jurisdiction of that much of the Church of Scientology case.

(footnote continued from previous page) not, it runs the risk that a subsequent court could read the district court's dispositive order as dismissing the presumably "unadjudicated" counts on the merits, thus barring the plaintiff from litigating such counts. This problem will not arise in this instance, however, because we vacate the district court's order and direct the dismissal of the case without prejudice.

7/ The court did not indicate whether these counts were being dismissed with or without prejudice, thus raising the problem we discuss supra note 6.

The City appealed the court's injunctive orders. We assume jurisdiction of these appeals pursuant to 28 U.S.C. § 1292(a)(1)(1982).[8]

B.

On April 20, 1984, the Church of Scientology, seeking to enjoin the emergency ordinance, No. 3479-84, moved the district court for leave to amend the remaining count of its complaint. Its proposed amendment presented the same constitutional challenges that had been addressed to the original ordinance. At the same time, the Church of Scientology moved the court to issue a temporary

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[8] 28 U.S.C. § 1292(a)(1) (1982) provides that the courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts granting or refusing to grant injunctions. These appeals are Nos. 84-3232 (Church of Scientology) and 84-3236 (Americans United).

restraining order prohibiting the City from enforcing Ordinance No. 3479-84. A hearing on these motions commenced one hour after they were filed. The Church of Scientology appeared, but the City did not. The court granted both motions and set April 27 as the date it would hear the plaintiff's application for a preliminary injunction. The hearing was continued, and the parties stipulated to an extension of the temporary restraining order pending resolution of such application.

The City of Clearwater enacted Ordinance No. 3479-84 as a permanent ordinance on May 17, 1984. On May 21, Americans United instituted a new action in the district court seeking injunctive relief and challenging the constitution-

ality of Ordinance No. 3479-84 on the grounds raised in its previous suit. Simultaneously, Americans United moved for a temporary restraining order, which the court granted. On May 24, the Church of Scientology also filed a new suit, seeking the same relief as Americans United on essentially the same grounds. At this point, the Church of Scientology had two identical suits pending, the newly filed suit and the previous case whose complaint had been amended.9/ On May 30, the court set July 13 as the date for a final hearing on both plaintiffs' applications for injunctive relief.10/

9/ The two Church of Scientology cases and the Americans United case challenging the new ordinance were not consolidated by the district court. See supra note 3.

10/ The court consolidated plaintiffs' application for preliminary injunctive (footnote continued)

Shortly thereafter, the City moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the plaintiffs' complaints for failure to state a claim for relief, and Americans United moved the courts for summary judgment. On June 19, the court issued an order informing the parties that it would limit the scope of the final hearing to the question of the facial constitutionality of the new ordinance.11/

(footnote continued from previous page) relief with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). See supra note 4.

11/ Because the July 13 hearing was limited to the facial constitutionality of the ordinance, the court must not have intended the hearing to be the sort of final hearing apparently contemplated by its May 30 order. See supra note 10.

The final hearing was held, as scheduled, on July 13, 1984. When the hearing began, the court announced that it would not consider the merits of any of the pending motions or receive any evidence. Rather, the court would only address the facial constitutionality of the ordinance in the abstract. During the hearing it became apparent that the court was concerned with one other issue, the plaintiffs' standing to challenge the ordinance. When the City's Attorney stated, in response to the court's inquiry as to his position, that the City was not contesting the plaintiffs' standing at that time, the court proceeded to the merits of their claims that the ordinance was unconstitutional on its face.

After hearing the argument of counsel, the court stated that, in its view, each and every section of the amended ordinance was facially constitutional, and, on July 23, the court entered written orders to that effect in the two Church of Scientology cases and the Americans United case. The orders stated, in addition, that the facial constitutionality of the ordinance constituted a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982)[12/] may materially

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12/ 28 U.S.C. § 1292(b) (1982) provides that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a
(footnote continued)

advance the ultimate termination of the litigation. An administrative panel of this court subsequently granted the plaintiffs leave to appeal from these interlocutory orders.13/

(footnote continued from previous page) controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

13/ These appeals are Nos. 84-3574 (Church of Scientology) and 84-3575 (Americans United).

At the July 13 hearing, the district court indicated that, although the new ordinance was facially valid, it would enjoin the City from enforcing the ordinance pending our disposition of any section 1292(b) appeals that may be taken. The City objected, contending that the court's decision upholding the ordinance rendered an injunction inappropriate and that, at the very least, the City should be able to enforce the ordinance's less burdensome provisions. On July 23, the court, after issuing the orders declaring the ordinance valid, issued a second set of orders converting the still extant temporary restraining orders to preliminary injunctions prohibiting the City from enforcing the portions of the ordinance that dealt with

a charitable organization's obligation to register with the City and to maintain certain records. The court gave no reasons for this action.

The City did not appeal from this preliminary injunction. The Church of Scientology has appealed, however, contending that the court erred in declaring the ordinance constitutional and that it should have enjoined the enforcement of the ordinance in its entirety.14/

C.

On July 31, 1984, the Church of Scientology, in an effort to get the district court to rule on its claims that the new ordinance was unconstitutional as

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14/ Jurisdiction over these appeals (No. 84-3543 and 84-3545) is conferred by 28 U.S.C. § 1292(a)(1) (1982). See supra note 8.

applied, moved the district court, in both of its cases, for a temporary restraining order prohibiting the City from enforcing the ordinance and requested the court to schedule an evidentiary hearing on its undisposed application for a preliminary injunction. A hearing on the motion for a temporary restraining order was held two days later. The Church of Scientology and the City appeared and presented argument. At the conclusion of the hearing, the court announced from the bench that it would deny the motion and would not give the Church of Scientology a hearing on its application for a preliminary injunction. Later in the day, the court issued written orders denying the plaintiff's motion for a temporary restraining order

and its application for a preliminary injunction. The Church of Scientology appeals from these orders.15/

After the parties' perfected their respective appeals, the Church of Scientology moved this court for an injunction prohibiting the City from enforcing Ordinance No. 3479-84 pending our disposition of such appeals. See Fed. R. App. P. 8. An administrative panel of this court granted the motion without opinion.

In deciding the parties' appeals, we first dispose of the district court's orders prohibiting the City from enforcing the repealed ordinance, No. 3091-83. We vacate those injunctive orders principally because the

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15/ Jurisdiction over these appeals (Nos. 85-3544 and 84-3546) is conferred by 28 U.S.C. § 1292(a)(1) (1982). See supra note 8.

controversy they adjudicated was, and is, moot. Second, we dismiss the section 1292(b) appeals from the district court's determination that the new ordinance, No. 3479-84, is facially constitutional because leave to prosecute these appeals was improvidently granted. Third, we affirm the district court's refusal to grant the Church of Scientology's applications for a preliminary injunction because the Church failed to establish the criteria necessary for the granting of preliminary injunctive relief.

II.

A.

The City of Clearwater has appealed from the district court's order in both the Americans United and the Church of Scientology cases declaring repealed

Ordinance No. 3091-83 unconstitutional and permanently enjoining its enforcement. Because we conclude that the issue of the ordinance's validity was moot at the time it was decided, we vacate the district court's orders enjoining the ordinance's enforcement and remand the two cases with instructions that they be dismissed without prejudice.16/

The Constitution limits the exercise of the judicial power to cases and controversies. U.S. Const. art. III, § 2. An action that has become moot or academic does not present a justiciable controversy within the case or controversy clause. See Aetna Life Insurance

16/ Because we do not decide these appeals on the merits, it follows that our direction to the district court must be to dismiss the cases without prejudice.

Co. v. Haworth, 300 U.S. 227, 239-40, 57 S. Ct. 461, 463-64 (1937). The case must consist of a present, live controversy in order to "avoid advisory opinions on abstract propositions of law." Hall v. Beals, 396 U.S. 45, 48, 90 S. Ct. 200, 201-02 (1969) (per curiam).

In addition to the constitutional limits on jurisdiction, the Supreme Court has established a long-standing policy of refusing to decide constitutional issues unless strictly necessary. Rescue Army v. Municipal Court, 331 U.S. 549, 568-72, 67 S. Ct. 1409, 1419-21 (1947). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality...unless such adjudication

is unavoidable." Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944). This rule is basic to the federal system and the judicial function within that structure. Rescue Army v. Municipal Court, 331 U.S. at 570-71, 67 S. Ct. at 1420-21.17/ Ordinance No. 3091-83 was no longer in force when the district court declared it unconstitutional.18/ "Where by...a

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17/ The rule is a corollary of the case and controversy requirement and works to achieve the same purpose. Rescue Army v. Municipal Court, 331 U.S. at 570-71, 67 S. Ct. at 1420-21. The line between the two is often very thin. Id.; see also 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.1, at 224-26 (2d ed. 1984).

18/ The Church of Scientology argues in its brief that Ordinance No. 3479-84 would have expired by its own terms in 90 days if not reenacted and that the old ordinance would then be revived. Brief for Appellee at 9-10, 21 n.13. No citation is given to support this
(footnote continued)

subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." United States v. Alaska S.S. Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449 (1920).19/

(footnote continued from previous page) assertion, nor did the district court discuss this issue of state law. We note, however, that Ordinance No. 3479-84 provided for the repeal of inconsistent ordinances and made no provision for bringing the prior ordinance back to life. There is some doubt whether the City of Clearwater would have the power under state law or its charter to enact such a measure.

19/ See Hearn v. Hudson, 549 F. Supp. 949 (W.D. Va. 1982) (repeal of challenged ordinance rendered moot a prayer for declaration of unconstitutionality); 6A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 57.13, at 57-127 (2d ed. 1984) ("statute passed during the course of litigation may make unnecessary a determination of the former controversy").

An actual controversy must exist at all stages of review. Preiser v. Newkirk, (footnote continued)

The district court justified its adjudication of the repealed ordinance on two grounds. First, the court had to decide the question; otherwise, the City could enact laws affecting the plaintiffs' constitutional rights and avoid an adjudication of the validity of those laws by amending them prior to a decision. In an appropriate case this concern might justify reaching a decision on the validity of an ordinance no longer

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(footnote continued from previous page) 422 U.S. 395, 401, 95 S. Ct. 2330, 2334 (1975). It is clear that the controversy over Ordinance No. 3091-83 retains no vitality at this stage of review. Ordinance No. 3479-84 has been permanently enacted and is the subject of vigorous litigation between the same parties. Accordingly, it would now be appropriate to vacate the judgments below with directions to dismiss the cases even if some controversy had existed at the time of the district court decision. See United States v. Munsingwear, Inc., 340 U.S. 36, 39-40, 71 S. Ct. 104, 106-07 (1950).

in force.20/ However, in this instance there was no indication that the City was acting in a manipulative fashion in order to prevent an adjudication or that any reasonable likelihood existed that Ordinance No. 3091-83 would regain vitality.21/ The proper course of action

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20/ See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S. Ct. 1070 (1982), where the City of Mesquite repealed the complained of portion of an ordinance after a district court declared it unconstitutional, but the appeal was not rendered moot because the City had announced an intention to reenact the objectionable language if the judgment were vacated. Id. at 289 & n.11, 102 S. Ct. at 1074-75 & n.11.

21/ The fact that the ordinance was repealed and a new one enacted indicates that the City wished to regulate the subject matter in question, but believed there were problems with the original ordinance. Under these circumstances, it does not appear that any likelihood existed of a return to the original ordinance.

Ample measures exist that would prevent a
(footnote continued)

would have been to allow the plaintiffs to amend their complaints and proceed to litigate the ordinance then in effect.[22]

(footnote continued from previous page) city from using last-minute amendments to avoid a determination on the constitutionality of its ordinances. For example, the rule that voluntary cessation of challenged conduct will not moot a controversy if there is a reasonable expectation that the alleged violation will recur might be applicable. See County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979). Review might also be available under the "capable of repetition yet evading review" exception to the mootness doctrine. This doctrine has two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975) (per curiam). The "capable of repetition" exception is not applicable to the present situation because there is little likelihood that review will be evaded. The City has enacted Ordinance No. 3479-84, regulating conduct similar to that regulated by the former ordinance, and the new ordinance is subject to review.

The court's second ground for deciding the validity of the repealed ordinance requires no discussion and no citation of authority. The fact that the court was laboring under a heavy docket and desired to bring these cases to a quick conclusion simply did not, and could not, justify the resolution of a constitutional question in the absence of a live controversy.

22/ There are numerous cases illustrating the principle that where a challenged ordinance is amended during litigation the appropriate course is to proceed to a consideration of the amended ordinance. See, e.g., International Soc'y for Krishna Consciousness v. City of Houston, 689 F.2d 541, 543 (5th Cir. Unit A 1982); Milwaukee Mobilization for Survival v. Milwaukee County Park Comm'n, 477 F. Supp. 1210, 1215 (E.D. Wis. 1979).

B.

In addition to presenting no live controversy over Ordinance No. 3091-83, the record contains no facts to support the district court's implied finding that the plaintiffs had standing to challenge the constitutionality of the ordinance. A threshold question in every federal case is whether the plaintiff has made out a justiciable case or controversy within the meaning of article III. See Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). This requires that the minimum constitutional standing requirements be demonstrated: actual or threatened injury, fairly traceable to the challanged action, and redressable by a favorable decision. Valley Forge Christian College v. Americans United for

Separation of Church and State, Inc., 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982).

The district court received no evidence, except a brief stipulation between the Church of Scientology and the City, prior to entering its injunctive orders. It merely entertained counsel's arguments on the legal question of the ordinance's facial constitutionality. Contrary to Fed. R. Civ. P. 52(a), the only facts the court recited in its orders were the enactment of the ordinance and the municipal status of the City.23/ These facts and those contained

23/ Fed. R. Civ. P. 52(a) requires the court to "find the facts specially and state separately its conclusions of law" in all actions tried without a jury. The only facts noted in the district court's memorandum opinion and orders were that the City, a municipality of the State of (footnote continued)

in the stipulation between the Church of Scientology and the City, as detailed in Part I.A., supra, did not provide an adequate basis to justify a finding of standing. There was no indication that the Church of Scientology operated in Clearwater and would be affected or injured by the ordinance.

It is true that the City informed the court that, except for the Church of Scientology's first amendment freedom of religion claims, it would not challenge the standing of the Church of Scientology to bring the action. A plaintiff does not acquire standing merely because the

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(footnote continued from previous page) Florida, enacted the ordinance in question, the plaintiffs challenged the ordinance, the City agreed not to enforce the ordinance pending the litigation, and the ordinance was subsequently amended. These facts had little, if any, bearing on the plaintiffs' standing to sue.

defendant raises no objection. Standing is a matter of the case-or-controversy requirement of article III, and a district court is obliged to ensure that this jurisdictional requirement is satisfied. Juidice v. Vail, 430 U.S. 327, 331, 91 S. Ct. 1211, 1215 (1977). In short, the district court was not free to rely on the City's concession on standing. Further, the City's concession excluded claims based on the freedom of religion clauses of the first amendment, which were the heart of the Church of Scientology's challenge to the ordinance and provided the basis for the district court's conclusion that the ordinance was unconstitutional.

Americans United and the City made no stipulation. The City did advise the court that it would not question the Americans United plaintiffs' standing, but in the same breath it insisted on reserving the right to challenge the standing of any of such plaintiffs to prosecute any of their claims. This inconsistent statement, which went unresolved, accomplished nothing. As to the plaintiffs in each of the cases before it, the court was obligated to determine that they had adequate standing to present their constitutional challenges. Bald assertions, or concessions, of counsel could not suffice. Standing is a mixed question of fact and law.[24] To the extent that it is a

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[24] Because standing is jurisdictional, (footnote continued)

question of fact, the court must find the facts and recite them in a fashion that will accommodate appellate review. See Fed. R. Civ. P. 52(a).

III.

Americans United and the Church of Scientology were granted leave to appeal, pursuant to 28 U.S.C. § 1292(b) (1982),25/ the interlocutory orders of the district court declaring Ordinance No. 3479-84 facially constitutional. We have concluded that their motions for leave to appeal these interlocutory

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(footnote continued from previous page) a reviewing court must satisfy itself that the constitutional requirements are satisfied. Secretary of State v. Joseph H. Munson, Co., ___ U.S. ___, 104 S. Ct. 2839, 2846 n.4 (1984). This is a legal determination based on the facts established by the record.

25/ See supra note 12.

orders were improvidently granted and vacate the orders allowing the appeals to proceed.

The district court, at its July 13 hearing on the facial validity of the new ordinance, expressly declined to consider Americans United's motion for summary judgment and the City's motions to dismiss each of the cases for failure to state a claim. Instead, the court ruled on the constitutionality of the ordinance in the abstract without any factual or evidentiary foundation. We have determined that the question of the constitutionality of the ordinance is not ripe for appellate review for several reasons.

There is no evidence in the record informing us whether the parties had standing to bring their constitutional

challenges. As stated in Part II.B., supra, it is not possible to determine whether any of the plaintiffs had standing to challenge the original ordinance. The problem became exacerbated when the plaintiffs attacked the new ordinance. Two new suits were instituted, and the Church of Scientology's original complaint was amended, but no factual findings have been made to support the new claims. The transcript of the July 13 hearing merely indicates that the City would not contest the plaintiffs' standing at that time. As we have stated, supra, the court had a constitutional obligation to ensure that the jurisdic-

tional standing requirements were met. See Juidice v. Vail, 430 U.S. at 331, 97 S. Ct. at 1215.26/

The statute permitting discretionary interlocutory review requires that the district judge have issued "an order not otherwise appealable." 28 U.S.C. § 1292(b) (1982) (emphasis added).27/

26/ We do not intimate any view on whether the plaintiffs can establish standing to sue. We merely note that it is impossible to make the determination on the basis of the record before us.

27/ 28 U.S.C. § 1292(b) also requires us to assess whether "an immediate appeal...may materially advance the ultimate termination of the litigation." We have considerable doubt whether an appeal in this instance satisfies this standard. The plaintiffs have sought preliminary injunctive relief alleging that the ordinance is facially unconstitutional and unconstitutional as applied. They are entitled to prompt consideration of their motions for preliminary relief. The district court has closed these cases pending the plaintiffs' appeal of its interlocutory orders, depriving the
(footnote continued)

Although the district court's decision on the facial constitutionality of Ordinance No. 3479-84 was denominated an order, we conclude that it was not an order within the meaning of the statute. The ruling was a mere expression of the district court's view of the law unassociated with the disposition of any claim. See Nickert v. Puget Sound Tug & Barge Co., 480 F.2d 1039, 1041 (9th Cir. 1973) (per curiam); Okolinsky v. Philadelphia, Bethlehem & New England Railroad, 282 F.2d 70, 71 (3d Cir. 1960). The court

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(footnote continued from previous page) plaintiffs of the opportunity to put forth evidence and establish their right to preliminary relief. The "ultimate termination" of this litigation would have best been accomplished by proceeding to a determination of the motions for a preliminary injunction. Appellate review of the grant or denial of the injunction would then have been appropriate. See supra note 8.

answered a hypothetical, abstract question of law. Its ruling had no concrete effect.

An appellate ruling on the facial validity of the new ordinance would be purely advisory. Aside from the constitutional prohibition against the rendering of advisory opinions, it would be unwise for us to establish part of the law of the case at this time. Such a decision could present difficulties for the district court and the parties beyond our ability to forsee as the case proceeds to a determination on the merits. See Nickert v. Puget Sound Tug & Barge Co., 480 F.2d at 1041; Molybdenum Corp. v. Kasey, 279 F.2d 216, 217 (9th Cir. 1960) (per curiam). What we have said deserves special emphasis where a

constitutional question is at issue. The deeply rooted doctrine that questions of constitutionality not be reached unless strictly necessary, see Rescue Army v. Municipal Court, 331 U.S. at 568-72, 67 S. Ct. at 1419-21, is particularly appropriate in this instance where no evidentiary or factual background is presented, no claims have been disposed of, and a purely hypothetical question is involved.

IV.

The Church of Scientology has appealed from the orders the district court entered following its facial constitutionality ruling which enjoined the enforcement of portions of Ordinance No. 3479-84 but declined to enjoin the ordinance in its entirety. The Church of

Scientology has also appealed from the district court's denial of a preliminary injunction on its claim that the ordinance was unconstitutional as applied. We affirm the district court's denial of the applications for preliminary injunctive relief.

The elements a plaintiff must satisfy to obtain a preliminary injunction are firmly established. The plaintiff must show that: (1) there is a substantial likelihood that it will prevail on the merits at trial; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) the benefits of the injunction will outweigh the harm it will cause the defendant; and (4) the issuance of the injunction will not harm public interests. Callaway v. Block, 763

F.2d 1283, 1287 (11th Cir. 1985). A district court's order denying a preliminary injunction will not be reversed absent an abuse of discretion. Id.

The record is devoid of any evidence indicating that this plaintiff established a right to an injunction.28/ It presented no evidence and established none of the criteria. The Church of Scientology would have us hold that it was entitled to preliminary injunctive relief as a matter of law solely on the basis of its naked allegations.29/ This of course we cannot do.

28/ No findings of fact or conclusions of law accompanied the district court's orders denying preliminary injunctive relief.

29/ The Church of Scientology has not complained of the district court's refusal to schedule a hearing on its application for a preliminary injunction. We therefore need not address the issue.

V.

Several consolidated appeals are presented in this case. Because we have determined that the controversy over Ordinance No. 3091-83 was moot when decided, we order, in Nos. 84-3232 and 84-3236, that the injunctions be VACATED and the cases dismissed without prejudice. We have found that leave to appeal the interlocutory orders in Nos. 84-3574 and 84-3575 was improvidently granted. We accordingly VACATE the orders granting such leave. We AFFIRM the district court's denial of the Church of Scientology's motions for a preliminary injunction in Nos. 84-3543, 84-3544, 84-3545, and 84-3546.

APPENDIX B

Opinion and Order of United States District Court for the Middle District of Florida on Application for A Preliminary Injunction Enjoining Enforcement of Ordinance No. 3091-83

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.

Plaintiff(s),

vs. CASE NO. 84-96-CIV-T-17

CITY OF CLEARWATER, et. al.,

Defendant(s).

and

AMERICANS UNITED FOR SEPARATION
OF CHURCH AND STATE, et. al.,

Plaintiff(s),

CASE NO. 84-97-CIV-T-17

vs.

CITY OF CLEARWATER, FLORIDA,
et. al.,

Defendant(s). /

MEMORANDUM OPINION AND ORDER

This cause is before the Court on complaints seeking declaratory and injunctive relief challenging the enforcement of Clearwater Ordinance

Number 3091-83 (see Appendix 1), enacted by the Clearwater City Commission on October 6, 1983.

The City of Clearwater is a municipality of the State of Florida. Ordinance 3091-83 was passed on October 6, 1983, and did not go into force until January 31, 1984. On January 27, 1984, the parties entered into a stipulation by which they agreed the ordinance would not be enforced during the pendency of the instant litigation.

One should always be careful when attempting to summarize an ordinance or statute. In brief, the Clearwater ordinance seeks to regulate the solicitation practices of charitable organizations within Clearwater by requiring a registration statement be filed with the City Clerk by the

charitable organization seeking to solicit funds. The ordinance also requires the charitable organizations which solicit funds to maintain records and documents necessary to complete a registration statement and the City Attorney is given the authority to investigate charitable organizations which solicit funds if complaints are received from ten or more individuals.

On January 20, 1984, Americans United for Separation of Church and State; National Council of the Churches of Christ in the U.S.A.; The American Jewish Committee; Suncoast American Baptist Church; Joyce Parr, individually and as Moderator of the Suncoast American Baptist Church; and James A. Christison, individually, and as Treasurer of the Suncoast American Baptist Church, filed a

complaint seeking injuncitive (sic) relief against the City of Clearwater; Mayor of the City of Clearwater; City Manager of the City of Clearwater; City Clerk of the City of Clearwater; and City Attorney of the City of Clearwater (case 84-97-CIV-T-17).

On January 23, 1984, the Church of Scientology Flag Service Organization, Inc. filed a complaint seeking injunctive relief against the City of Clearwater; the City Attorney of the City of Clearwater; and the City Clerk of the City of Clearwater (Case 84-96-CIV-T17).

For the purpose of reviewing the facial validity of the city ordinance, these cases were joined, and on March 9, 1984, the Court heard oral arguments. At the end of their presentations, the Court instructed counsel that they were to

provide any post-hearing memorandum of law to the Court by March 16, 1984, as the Court intended to rule on the facial validity of the ordinance by the end of March 1984. On March 15, 1984, the Clearwater City Commission passed an amended ordinance which incorporated some of the arguments Plaintiffs' counsel presented to the Court on March 9, 1984.

Despite the fact that the City of Clearwater has amended their ordinance, the Court feels that it has jurisdiction to consider the facial validity of Ordinance Number 3091-83 as presented in the complaints and argued by counsel March 9, 1984. The reason is quite simple: to decide otherwise would encourage a municipality to enact laws which apparently affect the constitutional rights of its citizens and upon

those laws being legally challenged, to then amend them and effectively prolong the period of time during which citizens are unsure of their constitutional rights.

Another reason the Court feels that it should rule on this question is because of the large number of cases pending, and needing, the Court's time. This Court must let parties have their day in court but will not permit them to have someone else's day. In short, the Court does not intend for cases to go on forever. There reaches a point of decision in all cases, and for Ordinance Number 3091-83, that point of decision is here.

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and

§ 1343(a)(3) and the Doctrine of Pendent Jurisdiction. Venue is proper pursuant to 28 U.S.C. § 1391(b).

A cursory reading of Ordinance 3091-83 should indicate even to a layman that the ordinance impacts upon First Amendment freedoms. We read a great deal about the First Amendment and often one wonders if we fully consider the simplicity, yet majesty of the phrases our forefathers put together to establish the freedoms which make the United States the most unique country on earth.

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacebly to assemble, and to petition the government for a redress of grievances.

There are a few fundamental principles regarding the establishment and free exercise of religion clauses of the First Amendment:

All persons must be free to practice their faith without governmental intrusion or regulation. If government does seek to regulate, and the regulation impacts on religious practice, the governmental regulation must be in the furtherance of a compelling state interest and the government regulation must be the least restrictive means necessary to further that compelling state interest. **Sherbert v. Verner,** 374 U.S. 398 (1963); **Wisconsin v. Yoder,** 406 U.S. 205 (1972).

The government, in pursuing its legitimate, secular purposes, must avoid administrative entanglement with religious institutions. **Walz v. Tax**

Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971).

The government must avoid associations favoring or opposing religion in general or specific religions in particular whether such discrimination is intentional or de facto. Abington School District v. Schempp, 374 U.S. 203 (1963) Larson v. Valente, 456 U.S. 228 (1982).

The government may not evaluate the benefits of religious practice including the truth or falsity of statements about the benefits of religious practices under any circumstances. United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

Laws enacted to regulate public solicitations by religious, political, and social organizations often impact on the religious guarantees of the First Amendment together with the freedom of speech and association protections in that amendment. Several principles have been developed to judge such laws.

Public solicitation is a protected activity under the First Amendment because, as a practical matter, fund raising is necessary for a church or association to survive and because it is an effective method of reaching the audience or membership to "get the word out". Cantwell v. Connecticut, 310 U.S. 296 (1940); Fernandes v. Limmer, 663 F.2d 619 (5 Cir. 1981).

There are areas in which the state may have an important interest in regulating solicitation activities of the public. The state or municipality has a legitimate interest in seeking to avoid disturbances of the peace and insuring public safety, and therefore, certain time, place, and method restraints can be placed on solicitation activities. Courts have also recognized that a state or municipality has an interest in prohibiting "fraud" in solicitations. In this regard, a municipality may regulate to insure that funds raised actually find their way to the organization for which the solicitation was given. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

The regulatory authority (ie. government) may not attempt to regulate the content of the representations made to induce contributions on the basis that the representations falsely state spiritual, emotional, or other benefits which may accrue to the contributor in this world or the next. **United States v. Ballard,** 322 U.S. 78 (1944).

As is the case with most statutes which impact upon First Amendment freedoms, any regulation of public solicitation must be by the least restrictive means necessary to further the compelling state interests. **Fernandes v. Limmer,** 663 F.2d 619 (5 Cir. 1981). No discretion must be left to the administrative and enforcement officials as to the scope or breath [sic] of the regulation **Hynes v. Mayor and Council of**

the Borough or Oradell, 425 U.S. 610 (1976); Village of Schaumberg (sic) v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Regulations concerning solicitations must be limited to those solicitations of the public in public places. International Society of Kirshna (sic) Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). Regulation of solicitations on the premises of a church or political association is not necessary because that activity could not disturb the public; there is not a danger of misrepresentation in this solicitations, by the organization for which contributins were sought. See City of Houston supra, at 562.

Any regulation of public solicitations must not effect a prior restraint upon such activities. Prompt and adequate judicial review procedures including appeal must be available to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed. **Fernandes v. Limmer**, supra at 628.

The state may not pass laws which aid one religion or which prefer one religion over another. This principle of neutrality among religions requires the court to examine this ordinance on its face to determine whether it will have a discriminatory or unequal effect upon different religious groups or practices by exempting some churches or religious organizations, and, subjecting others to

regulations or burdens. **Epperson v. Arkansas**, 393 U.S. 97 (1968); and **Larson v. Valente**, 456 U.S. 228 (1982).

If the Court finds such a result, i.e., discrimination, the legislation must be struck down unless the discriminatory features are necessary to further a compelling state interest and unless there exists no less restrictive means to accomplish the state interest without imposing disparate burdens upon religious groups **Larson v. Valente,** supra, at 244-255.

In **Larson** the Supreme Court found that an ordinance which created a disparate impact upon smaller religious groups and exempted more established churches, could not be justified by a compelling interest. The court went on to find that the ordinance imposed

registration and reporting requirements on some religious organizations, but not on others; this non-evenhanded operation created an indication of official denominational preference.

Clearwater Ordinance 3091-83 exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non-regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are <u>not</u> exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and

actively engaged in proselytizing and fund raising falls under the regulatory scheme of this ordinance.

How can a church whose congregation or group of members is growing, ever, at any given time, indicate to civil authority the number of "members" it has in regular attendance or as participants in the organization?

If a drunk were to stagger into a church and "be saved" and then indicate an intention to dedicate his life to its purposes through regular attendance at that church, would he be a "member"?

There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance not only impies a religious preference, its mere

presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

The Defendant has indicated, during oral argument, that the Clearwater ordinance was modeled after a recent ordinance in the City of Houston and therefore this ordinance should be upheld upon the authority of **International Society for Krishna Consciusness of Ouston, Inc. v. City of Houston, Texas,** 689 F.2d 541 (5 Cir. 1982). The Court finds there is no safe harbor for Clearwater in the **City of Houston** as the Houston ordinance did not license the discriminatory power in administrative officials plus the investigatory and

enforcing powers which the Clearwater ordinance encompasses. In fact, the Houston ordinance did not grant the power to officials charged with enforcing the solicitation ordinance to conduct investigations, compel disclosure, and prosecute organizations who must register. The Firth Circuit recognized and emphasized Houston's amendment of their ordinance was critical in that Court's decision upholding the ordinance, as the amended ordinance eliminated language allowing enforcing officials in Houston to "make such investigation as he may deem necessary to ascertain the truth of the facts and information set out" in the registration statement.

In Clearwater's ordinance, the City Attorney is granted broad investigatory powers to investigate violations of the

prohibited acts section of the ordinance (see Section 100.06, 100.05(a)(b), 100.05(1)(a), 100.05(1)(c), 100.05(1)(g). The Clearwater ordinance does precisely what the Fifth Circuit emphasized the Houston ordinance did not.

The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights and accordingly, it is unconstitutional. Grayned v. City of Rockford, 408 U.S. 104

(1972); Baggett v. Bullitt, 377 U.S. 360 (1964); Kolender v. Lawson, ___ U.S. ___, 75 L.Ed.2d 903 (1983) (involving a criminal statute).

At oral argument counsel for Americans United described the ordinance as one in which "a shot gun was used to shoot a mouse". This Court would not state that analogy as a test for constitutionality; however, the Court is compelled, upon review of Clearwater Ordinance 3091-83 to declare the ordinance unconstitutional as it will impact upon smaller churches with growing or changing congregations, requiring smaller churches to be subjected to regulation while exempting more established congregations, thereby violating the principle of neutrality without a compelling state interset.

Further, the Court finds that the instant ordinance is quite different than that addressed by the Fifth Circuit in the **City of Houston.**

Accordingly, the Court declares Clearwater City Ordinance Number 3091-83 unconstitutional and permanently enjoins its application or enforcement.

Case 84-97 is hereby **dismissed** and Case 84-96 is hereby dismissed as to Counts Two through Twelve of the complaint; the Clerk is directed to enter judgments for the respective Plaintiffs against Defendants. Jurisdiction is retained for the enforcement of the executory provisions herein.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 28th day of March, 1984.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX C

Order of the United States District Court
For the Middle District of Florida
Temporarily Restraining Enforcement of
Ordinance No. 3479-84

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff

Case No.
84-96-Civ.T-17

vs.

CITY OF CLEARWATER, THOMAS
BUSTIN, City Attorney of the
City of Clearwater, and
LUCILLE WILLIAMS, City Clerk
of the City of Clearwater,

Defendants /

TEMPORARY RESTRAINING ORDER

This matter coming on to be heard before the Court on Plaintiff's Motion for Temporary Restraining Order, and Memorandum of Law in support of that Motion, and the Court having duly considered the same, as well as the allegations of the proposed Supplemental

Complaint, and the Affidavit of Mary Story, and being otherwise fully advised in the premises, the Court finds:

1. Plaintiff seeks the entry of a temporary restraining order, temporarily enjoining the Defendants, THE CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney, and LUCILLE WILLIAMS, City Clerk, together with their officers, agents, servants, employees and attorneys, from enforcing, or attempting to enforce, any of the provisions of Clearwater Ordinance No. 3479-84 against the plaintiff, or any of its officers, employees, or agents, or from subsequently imposing, or attempting to impose, any sanctions or punishments of any kind whatsoever against the Plaintiff, or any officers, employees, or agents of the Plaintiff, for their failure to comply with any of the pro-

visions of this Ordinance, pending a hearing on Plaintiff's Motion for a Preliminary Injunction.

2. In the event that Defendants are not temporarily enjoined from enforcing, or attempting to enforce the provisions of Ordinance No. 3479-84 against the Plaintiff, the Plaintiff, its officers, agents, employees, servants and members will be subject to terms of imprisonment and fines, and, presumably, will forfeit their rights to engage in religious fund raising activities. In addition, Plaintiff, its officers, agents, employees, servants and members are threatened with imminent investigation of internal church matters, with the denial of its rights to obtain and make contributions, and with the imminent imposition of serious civil and criminal penalties unless it refrains

from the dissemination of religious ideas and from engaging in the practice of religion.

3. In the event that a temporary restraining order is issued, neither the Defendants, nor any other persons or entities, or the public at large, would be prejudiced.

4. The facts set forth in the proposed Supplemental Complaint demonstrate that there is no need or necessity for the posting of security pursuant to Rule 65(c), F.R. Civ. P.

5. Plaintiff's Motion for Leave to File Supplemental Complaint should be granted.

Accordingly, and based upon the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Leave to file Supplemental Complaint is hereby granted.

2. Plaintiff's Motion for Temporary Restraining Order is hereby granted.

3. The Defendants, as well as their officers, agents, servants, employees and attorneys, are hereby restrained and enjoined from enforcing, or attempting to enforce, any of the provisions of Clearwater Ordinance No. 3479-84 against the Plaintiff, or any of its officers, employees, agents, servants or members, and from subsequently imposing, or attempting to impose, any sanctions or punishment of any kind whatsoever against the Plaintiff, as well as any of its officers, employees, agents, servants or members, for their failure to comply with any of the provisions of Clearwater

Ordinance No. 3479-84, pending a hearing on Plaintiff's Motion for a Preliminary Injunction.

3. (sic) A hearing on Plaintiff's Motion for Preliminary Injunction is hereby scheduled for April 27, 1984 at 3:00 p.m.

DONE and ORDERED in Chambers, Tampa, Hillsborough County, Florida, this 20th day of April, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:

Paul B. Johnson, Esq.
Johnson, Paniello & Hayes

John T. Blakely, Esq.

Frank Kowalski, Chief Assistant
City Attorney

APPENDIX D

Oral Opinion of the United States District Court For the Middle District of Florida on the Facial Validity of Ordinance No. 3479-84

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC., et al.,

Plaintiffs,

Case No. 84-719-CIV-T-17 [84-96-CIV-T-17]

vs.

Tampa, Florida July 13, 1984

CITY OF CLEARWATER, et al.,

Defendants.

EXCERPT OF HEARING ON FACILE (sic) VALIDITY OF A MUNICIPAL ORDINANCE BEFORE THE HONORABLE ELIZABETH A. KOVACHEVICH

TRANSCRIPT ORDERED BY:
JOHN T. BLAKELY, Esquire

APPEARANCES:

FOR THE PLAINTIFFS:

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FOR THE DEFENDANTS:

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City of Clearwater
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P R O C E E D I N G S

THE COURT: Good afternoon, ladies and gentlemen in the courtroom. If you will, ladies and gentlemen, for purposes of the record and for the court reporter after I call this case, to make sure we are getting the right numbers and also to identify yourselves and who you represent for these proceedings.

Originally there were cases that were filed 84-96 and 84-97, involving respectively under 84-96, the Church of Scientology versus Clearwater, et al. And then under 84-97 it was Americans United For Separation of Church and State, et al versus Clearwater, et al, which was 84-97. The 84-97 case is closed. The 84-96 is not closed and its companion case is 84-719, Church of Scientology versus Clearwater, et al.

The Americans United For the Separation of Church and State, et al. versus Clearwater, et al, is now 84-699.

Would you stand, left to right, as I look at you, and identify yourselves and indicate who you represent and tell me whther or not we called the right numbers. Left to right -- Mr. Blakely.

MR. BLAKELY: John Blakely. I represent the City of Clearwater. I believe the numbers you called are correct.

THE COURT: Thank you.

MR. WALKER: Robert Walker. I represent the City of Clearwater, too.

MR. BOOTHBY: Lee Boothby. I represent the Plaintiffs in Case Number 84-699-Civ-T-17, Your Honor.

MR. PALMOUR: Frank Palmour, Your Honor. I also represent the Plaintiff in Case 84-699.

MR. LIEBERMAN: Eric Lieberman, representing the Church of Scientology in both 84-96 and 84-719. I believe the case numbers are correct.

MS. STONE: Katherine Stone. I also represent the Church of Scientology and 84-96 and 84-719.

MR. TRENT: Earl Trent. I represent the American Baptist Church in the U.S.A. I believe the case numbers are correct.

THE COURT: All right. Thank you very much, gentlemen and ladies. The last time that we came before the Court for a hearing in this case, this Court rendered a certain opinion in which the Court made certain specific findings declaring the ordinance to be unconsti-

tutional. Those particular matters, I think, could be concisely stated as the difficulty with the membership provision and the discretionary phase of the ordinance relative to the enforcement by the City attorney. Since that time an amended ordinance has been passed and it is the subject of the litigation before this Court. Once again, we are confronted with facial validity of this ordinance.

Are we all in agreement with regard to that as the purpose of this hearing, the facial validity of an ordinance? Mr. Blakely?

Mr. Walker?

MR. BLAKELY: Your Honor, that is my understanding and because of that I noticed in the briefs that were filed, there was frequent reference to affida-

vits that were filed by Plaintiffs and in the last reply brief filed by the Americans United, there was frequent reference to a deposition that was taken of Mr. Bustin last week. I assume, because we are only considering the facial validity of the ordinance, that this Court will not permit reference to affidavits or depositions during this proceeding today; is that correct:

THE COURT: That is correct. For the purpose of this proceeding today, I knew there have been Motions for Summary Judgment and things of that nature that have been filed, and this Court has determined to -- consistent with what we did the last time and consistent with the representations that I made to counsel to deal with the facial validity of the ordinance. And that is what I want to

deal with. If there is anything further that has to be done after that, then we will consider that matter. But that is what I want to address, the facial validity. Now, that is your understanding? Also we do not have a problem, once again, with standing.

MR. BLAKELY: We are not contesting standing today.

THE COURT: You are not contesting standing -- just facial validity. You agree, Mr. Blakely?

MR. BLAKELY: Yes, Your Honor.

* * * *

THE COURT: I'm ruling right now.

This court has examined the case as it commenced this year, examined its memorandum opinion and order entered

herein, and has mentioned to you at the commencement of our proceedings today, that the questions with regard to membership and the discretion of the City were paramount in our determination of the unconstitutionality of this Ordinance.

This Court considered severability and did not believe that it was appropriate at this time.

The Ordinance has been amended and the Court has to look at it de novo to make a determination facilely (sic) with regard to this Ordinance.

This Court wants to reemphasize the role that any Judicial Officer has representing the third branch of government. We interrupt (sic) the laws that are made by the legislative bodies, whether those legislative bodies are

Congressional, whether they are legislative bodies of a Sovereign State, or the legislative bodies of Municipal Ordinances.

The individuals who make the laws are the elected representatives of the people, who in making these laws, provide contemporary expression of the public's will and the public's policy.

What may have been the situation back in the 1800's and the early 1900's may not be the circumstances today. And this Court notes that this case has far reaching implications and that it may well find itself before the Supreme Court of the United States before it is ultimately resolved by the Supreme Judicial Authority in this country.

The cases that occurred in Texas are of particular note to this Court. The Ordinance that was passed in Houston was initially passed back in 1969. It was tested by the Plaintiff back in 1979, and there was an expression rendered by the Fifth Circuit Court of Appeals in 1982. And the Court's decision responded to an Ordinance that was passed expressing the will of the people regarding financial disclosure in charitable solicitation situations.

One year later in the City of Humble, Texas, in the Case of Poe versus the City of Humble, Texas, reported at 554 Federal Supplement 233, a member of a religious society brought action challenging the constitutionality of a Religious Solicitation Ordinance and the Federal Judge in that situation upheld

the constitutionality of that Ordinance citing the City of Houston Case. Now, in 1984, we have the City of Clearwater expressing through it's elected representatives the will of the people of the City of Clearwater. Expressing what they determine to be their public policy and the controls that they wish to exhibit with regard to financial disclosure and charitable solicitations. This Court is not confronted with the making of that law and the why of the making of that law. What this Court is confronted with is the Facile (sic) Validity and constitutionality of that law. It would appear to this Court, and I specifically rule -- and Mr. Blakely you can prepare an order to this effect, because I think the best interests of everyone are served by this -- that this Court finds

specifically that each and every section of the Amended Ordinance 34-79-84 as it has been amended, 100.01 through 100.13, I believe it is, as amended, is valid -- Facilily (sic) Valid and constitutional.

This Court would note as dictum that the State Attorney of the State of Florida pursuant to Florida Constitution Article 5, Section 17, is authorized by general law to prosecute violations of all Municipal Ordinances that may also be prosecuted by Municipal Prosecuters (sic).

The Court was initially concerned that there could be a year's usurpation of the authority of the State Attorney by that enforcement provision in that Ordinance. The Court has determined that there is no usurpation of the State Attorney's authority here. However, I

note with interest that there may be some very unique proof problems presented when the time may arise for prosecution of this misdemeaner (sic).

This Court would urge an Interlocutory Appeal at this juncture. I think this ought to be tested. I think it has far reaching implications to it. And I think that rather than proceed forward with any form of Evidentiary Hearing, it would be better for this case to go immediately to the Eleventh Circuit and to take it's route from there, if necessary, to the United States Supreme Court.

If no Interlocutory Appeal were taken in this situation, then the enforcement of this Ordinance will become operational immediately, and whatever

flows from that, including Evidentiary Hearings, would have to be set before the Court, etc.

I'm not so sure that that's a wise way to proceed. But, Mr. Blakely, you can prepare a proposed order for this Court to sign.

Mr. Boothby.

APPENDIX E

Order of the United States District Court For the Middle District of Florida on the Facial Validity of Ordinance No. 3479-84

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Case No.
84-96-CIV-T-17

Plaintiff(s),

vs.

CITY OF CLEARWATER,
et al.,

Defendant(s).

ORDER

In their complaint, inter alia, the plaintiffs contend that amended ordinance 3479-84, a copy of which is attached, facially violates the freedom of religion, freedom of press, freedom of speech, and freedom of association guarantees of the First Amendment; the right of privacy guarantee of the First,

Fourth, Fifth, and Ninth Amendments; and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. To facilitate and accelerate the disposition of these claims, the Court requested the parties to submit legal memoranda solely on the issue of the constitutionality of the amended ordinance on its face. Having considered the memoranda, the arguments of the parties, and International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5th Cir. 1982) and Poe v. City of Humble, Texas, 554 F. Supp. 233 (S.D. Texas 1983), the Court now rules that each and every section of amended ordinance 3479-84 is constitutional on its face.

Pursuant to Title 28 U.S.C. §1292(b), the Court expressly opines that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. Counsel have indicated to the Court their desire to immediately appeal this Court's ruling; therefore, the Court orders the Clerk of the Court to Administratively Close case numbers 84-96, 84-699, and 84-719 during the pendency of said appeal.

DONE and ORDERED in Chambers, in Tampa, Florida, this 23rd day of July, 1984.

Elizabeth A. Kovachevich
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX F

Order of United States District Court For the Middle District of Florida Partially Enjoining Ordinance No. 3479-84

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff,

Case No.
84-96-Civ.T-17

vs.

CITY OF CLEARWATER, THOMAS
BUSTIN, City Attorney of the
City of Clearwater, and
LUCILLE WILLIAMS, City Clerk
of the City of Clearwater,

Defendants. /

ORDER AMENDING PRELIMINARY INJUNCTION

This Court entered a temporary restraining order in this action on April 20, 1984. The temporary restraining order is hereby converted to a preliminary injunction; however the preliminary injunction is limited in its application to those provisions of amended ordinance 3479-84 that impose requirements regarding registration and maintenance of

records pertaining to the information in the registration statements. Specifically, by the preliminary injunction, the defendants are hereafter only restrained and enjoined from enforcing Sections 100.03, 100.04, and subparagraphs (d), (i) (j) and (k) of Section 100.05 of amended ordinance 3479-84.

DONE and ORDERED in chambers in Tampa, Florida, this 23rd day of July, 1984.

United States District Judge
ELIZABETH A. KOVACHEVICH
United States District Judge

APPENDIX G

Order of United States District Court For the Middle District of Florida Denying Application For Preliminary Injunction On Ground That Ordinance No. 3479-84 Is Unconstitutional As Applied

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY
FLAG SERVICE ORG., INC.,

Plaintiff(s),

Case No.
84-96-CIV-T-17

v.

CITY OF CLEARWATER, et al.,

Defendant(s). /

ORDER

The Court hereby makes the following orders regarding this case:

1. Plaintiff's motion for a temporary restraining order is **denied.**

2. Plaintiff's motion for a preliminary injunction is **denied.**

3. This case will continue to be administratively closed pending appellate review.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 2nd day of August, 1984.

/s/
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record

APPENDIX H

Order of the United States Court of Appeals For the Eleventh Circuit Granting Leave to Appeal and Staying Enforcement of Ordinance No. 3479-84 Pending Appeal

FILED AUGUST 17, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3543, 84-3544,
84-3545, 84-3546,
84-2055 and 84-2056

CHURCH OF SCIENTOLOGY FLAG
SERVICE ORG., INC.,

Plaintiff-Appellant,

v.

CITY OF CLEARWATER, et al.,

Defendants-Appellees.

Appeal from the United States
District Court
for the Middle District of Florida

(, 1984)

Before: HILL, FAY and HATCHETT,
Circuit Judges

B Y T H E C O U R T:

Appellant's emergency motion for an injunction pending appeal in the above numbered cases is GRANTED. Appellees are hereby enjoined from enforcing Ordinance No. 3479-84 during the pendency of the appeal in these cases.

Further, appellant's motion in Nos. 84-2055 and 84-2056 for leave to appeal from the interlocutory order of the United States District Court for the Middle District of Florida signed on July 23, 1984, and filed on July 24, 1984, is GRANTED. These cases, while not ordered expedited, shall, when briefing is completed, be set for oral argument and heard together with the appeal in case No. 84-2057.

APPENDIX I

Order of the United States Court of Appeals For the Eleventh Circuit Denying Petition for Rehearing and Suggestion of Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3543, 84-3544,
84-3545, 84-3546, 84-3574

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,

Plaintiff-Appellant,

versus

CITY OF CLEARWATER, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 13, 1985), 11 Cir., 198_, ___F.2d___).

(Filed December 19, 1985)

Before TJOFLAT and KRAVITCH, Circuit Judges, and Dumbauld*, District Judge.

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* Hon. Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

APPENDIX J

Clearwater Ordinance No. 3479-84

ORDINANCE NO. 3479-84

AN ORDINANCE OF THE CITY OF CLEARWATER, FLORIDA, AMENDING SECTION 100.01, DEFINITIONS, SECTION 100.02, EXEMPTIONS, SECTION 100.03, REGISTRATION WITH CITY CLERK, SECTION 100.04, MAINTENANCE OF RECORDS, SECTION 100.05, PROHIBITED ACTS, SECTION 100.06, POWER OF THE CITY ATTORNEY TO INVESTIGATE AND PROSECUTE PROHIBITED ACTS OF CHARITABLE ORGANIZATIONS, SECTION 100.07, DAMAGE TO INJURED PERSONS, SECTION 100.08, NOTICE TO THE PUBLIC ABOUT THE PROVISIONS OF THIS CHAPTER, OF CHAPTER 100, SOLICITATION OF FUNDS FOR CHARITABLE PURPOSES, OF TITLE VIII, PUBLIC HEALTH AND SAFETY, OF THE CODE OF ORDINANCES, CITY OF CLEARWATER; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "CHARITABLE ORGANIZATION"; TO REVISE AND EXPAND THE DEFINITION OF THE TERM "SOLICIT FUNDS" TO INCLUDE A SERIES OF ITEMS WHEREUPON REPRESENTATION OF THE PROCEEDS OF THE SALE OF SUCH ITEMS WILL BE USED FOR THE CHARITABLE PURPOSE; TO REMOVE THE DEFINITION OF THE TERM "MEMBER" AND THE DEFINITION OF THE TERM "NATIONAL ORGANIZATION"; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "PROFESSIONAL SOLICITOR"; TO REVISE EACH OF THE EXEMPTION CATETORIES [SIC] AND REMOVE LANGUAGE RELATING TO FUNDS IN EXCESS OF $10,000; TO REMOVE LANGUAGE RELATING TO THE MAINTENANCE OF RECORDS; TO REMOVE LANGUAGE RELATING TO THE ISSUANCE OF AN ANNOUNCEMENT OR ADVERTISEMENT; TO REQUIRE IN THE REGISTRATION STATEMENT AN ESTIMATED PERCENTAGE OF THE TOTAL PROJECTED

COLLECTIONS WHICH THE COST OF THE SOLICITATION WILL COMPRISE; TO REQUIRE IN THE REGISTRATION STATEMENT THAT A CHARITABLE ORGANIZATION WILL MAINTAIN THE RECORDS AND DOCUMENTS NECESSARY TO FILE THE REPORTING STATEMENT AND PROVIDE A DESCRIPTION OF THOSE RECORDS AND DOCUMENTS; TO REQUIRE THE FILING OF A DECLARATORY JUDGMENT ACTION WHERE THE CITY CLERK HAS DENIED ISSUANCE OF A CERTIFICATE OF REGISTRATION AND THE CHARITABLE ORGANIZATION DISAGREES WITH SUCH DECISIONS; TO PERMIT THE CHARITABLE ORGANIZATION TO SOLICIT FUNDS WITHOUT COMPLIANCE WITH THE REGISTRATION PROVISION UNLESS AND UNTIL THE CIRCUIT COURT RULES THAT THE CITY CLERK'S REFUSAL TO ISSUE THE CERTIFICATE WAS PROPER; TO EXPAND THE SCOPE RELATING TO THE FILING BY A CHARITABLE ORGANIZATION OF ANY SIMILAR REGISTRATION STATEMENT FILED IN ANY STATE, CITY OR COUNTY TO PERMIT THE FILING OF THE SAME WITH THE CITY CLERK; TO REWORD THE REPORTING AND DISCLOSURE PROVISION TO CLARIFY WHAT MONEY AND PROPERTY IS TO BE DISCLOSED; TO REQUIRE THAT CHARITABLE ORGANIZATIONS MAINTAIN RECORDS OR DOCUMENTS NECESSARY TO FILE COMPLETE AND TRUTHFUL STATEMENTS REQUIRED BY SECTOIN 100.03 FOR A PERIOD OF THREE (3) YEARS FROM THE FILING OF EACH STATEMENT AND TO DISPENSE WITH ALL OTHER MAINTENANCE FUNCTIONS; TO DELETE THE POWER OF THE CITY CLERK TO DECLARE A DEFAULT; TO REWORD AND CLARIFY INDIVIDUAL SUBPARAGRAPHS OF THE PROHIBITED ACTS AND TO ADD NEW PROHIBITED ACT RELATING TO THE WILLFUL FAILURE TO MAINTAIN THE RECORDS OR DOCUMENTS REQUIRED BY SECTION 100.04;

TO ADD A NEW PROHIBITED ACT RELATING TO PRIVATE STATEMENTS; TO MAKE THE INVESTIGATION TO BE PERFORMED BY THE CITY ATTORNEY MANDATORY IN CHARACTER; TO GRANT THE CITY ATTORNEY SUBPOENA POWER WITH RESPECT TO THE RECORDS OR DOCUMENTS DESCRIBED IN SECTION 100.04; TO DELETE THE SUBPARAGRAPH RELATING TO THE CITY ATTORNEY'S ACCESS TO PUBLIC RECORDS AS BEING UNNECESSARY IN LIGHT OF CHAPTER 119, FLORIDA STATUTES; TO PERMIT THE CITY ATTORNEY TO PROSECUTE VIOLATIONS OF THE PROHIBITED ACTS WHERE PROBABLE CAUSE EXISTS; TO PERMIT A CHARITABLE ORGANIZATION TO EXCLUDE SOLICITATION INFORMATION RELATING TO MEMBERS FROM ITS REGISTRATION STATEMENT WHERE A PRIVATE STATEMENT IS MAINTAINED; AND TO CHANGE INDIVIDUAL WORDS AND PUNCTUATION FOR SENSE AND CLARITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT HEREWITH TO THE EXTENT OF SUCH CONFLICT; PROVIDING FOR AN EMERGENCY PURSUANT TO SECTION 166.041, FLORIDA STATUTES; DECLARING THAT THE CITY OF CLEARWATER IS EXEMPT FROM PINELLAS COUNTY ORDINANCE 82-38; DECLARING THAT A PUBLIC EMERGENCY EXISTS AFFECTING THE WELFARE OF THE CITIZENS OF THE CITY OF CLEARWATER; AND PROVIDING FOR THE EFFECTIVE DATE OF THIS ORDINANCE.

WHEREAS, the City of Clearwater, Florida, is presently involved in litigation directed toward the validity of Chapter 100 of the Clearwater Code of Ordinances; and

WHEREAS, Fifth Circuit Judge Wisdom, in similar litigation involving the City of Houston, Texas, commended the City for further narrowing its ordinance during the pendency of that litigation; and

WHEREAS, it would further serve the purpose for which Chapter 100 was created to narrow and refine the scope of each provision and thereby preserve the integrity of that chapter and the public purpose it serves; and

WHEREAS, just like the City of Houston, it is felt that further refining and narrowing should be accomplished prior to the conclusion of the litigation mentioned herein; and

WHEREAS, an emergency exists within the City of Clearwater in that it is immediately necessary that the scope and wording of Chapter 100 of Clearwater Code of Ordinances be further narrowed and refined by addressing each and every narrowing type of question that could be raised prior to the termination of the litigation mentioned herein, thereby preserving and enhancing the public purpose for the ordinance and the welfare of the citizens of the City of Clearwater.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA;

Section 1. That Section 100.01, Definitions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.01. Definitions.

As used in this chapter,

(1) The term "charitable organization" shall mean an organization or person which is or holds itself out to be a benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary organization that

solicits funds ~~or obtains contributions solicited from the public~~ for charitable purposes. ~~A branch, area, chapter, office or similar affiliate or any person soliciting contributions within the City of Clearwater for a charitable organization that has its principal place of business outside the City shall be a charitable organization for the purposes of this chapter.~~

(2) The term "solicit funds" or "solicitation of funds" shall mean any request within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible,

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whether of value or not, including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary

health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed to include the direct benefit of the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

(2) The term "solicit funds" or "solicitation of funds" shall mean any request, within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible, whether of value or not, including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined. Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of

membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed to include the direct benefit of

the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

~~(5) The term "member" shall mean any person regularly attending or participating in a charitable organization.~~

~~(6) The term "national organization" means that part of a charitable organization that coordinates, supervises, or exercises control over policy, fund-raising, or expenditures, or assists or advises one or more chapters, branches, areas, officers, or affiliates in the City.~~

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(~~7~~ 5) The term "professional solicitor" means ~~any person who, for a financial or other consideration, solicits contributions for, or on behalf of, a charitable organization whether such solicitation is performed personally or through agents, servants, or employees specifically employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; however, no agent, servant, or employee of a professional solicitor shall be deemed to be a professional solicitor. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the state shall not be deemed to be a professional solicitor. No attorney, registered~~

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~~investment counselor, CPA or accountant, or banker who advises any person to make a contribution to a charitable organization shall be deemed, as a result of such advice, to be a professional solicitor~~ any person who is compensated for his or her or its solicitation of funds for charitable purposes in any manner whatsoever that is based on or related to the amount of money or property collected as a result of his or her or its solicitations of funds.

Section 2. That Section 100.02, Exemptions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clear-

water, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.02. Exemptions.

(1) Notwithstanding the foregoing, a charitable organization that does not employ a professional solicitor to solicit funds shall be exempt from the provisions ~~of this chapter~~ of Sections 100.03 and 100.04;(a) if it ~~does~~ did not ~~receive contributions~~ collect money or property from more than 20 persons as a result of the solicitation of funds during the preceding twelve (12) months; ~~or~~ (b) if all of its functions, including fund raising activities, within the City of Clearwater, are carried on by persons who are unpaid for their services; ~~or~~ (c) if no part of the charitable organiza-

tion's assets or income inures to the benefit of or is paid to any officer or member; ~~or if the solicitation is in the form of a donation or collection that occurred within the membership of the charitable organization; or~~ (d) if the charitable organization ~~does not raise or receive contributions from the public~~ did not collect money or property as a result of the solicitation of funds in excess of $10,000 during ~~its annual reporting~~ period the preceding (sic) twelve (12) months. ~~Nevertheless, if the contributions raised from the public are in excess of $10,000 for said annual reporting period, the charitable organization shall, within 30 days after the date it shall have received total contributions in excess of $10,000,~~

register subject to the provision of this chapter. Any such exempt charitable organization shall lose such exemption when it employs a professional solicitor. Nevertheless, such organization shall maintain such records as necessary to prove that the organization qualifies for such exemption.

(2) Every scholarship fund that solicits and raises funds solely for the purpose of providing scholarships shall be exempt from the registration provisions provided for in this chapter if all of the fund's functions, including fund raising activities, are carried on by persons who are unpaid for their services and if no part of the organiza-

tion's assets or income inures to the benefit of, or is paid to, any officer or member.

~~(3)~~ The issuance of any ~~announce-~~ ~~ment or~~ advertisement ~~that~~ such ~~solici-~~ ~~tation~~ as described ~~in~~ ~~subsection (2)~~ above will ~~occur~~ or ~~which~~ announces ~~or~~ ~~advertises~~ an event at ~~which~~ ~~unannounced~~ ~~solicitation~~ as ~~described~~ ~~in~~ ~~subsection~~ ~~(2) above~~ occurs ~~shall~~ ~~be exempt from the~~ registration ~~provisions of this chapter.~~

(3) If a charitable organization does not want to disclose publicly the information required by the statements described in Section 100.03 regarding the solicitation of funds from members of the charitable organization, it may exclude this information from the statements required by Section 100.03 if:

(a) it indicates on the statement required by Section 100.03 that information about solicitation of funds from members of the charitable organization has been excluded, and

(b) it prepares a private statement at least annually that contains all of the information required by the statements described in Section 100.03 for the solicitation of funds from members of the charitable organization that is not reported in the statements required by Section 100.03, which is signed under oath by the individual described in subparagraph 1(o) of Section 100.03, and

(c) it maintains the records and documents that are necessary to complete this private statement for a period of three years from the date of each state-

ment, and together with the private statement, makes them reasonably available for inspection by every member of the charitable organization.

Section 3. That Section 100.03, Registration with City Clerk, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or reletterd where necessary to read as follows:

Section 100.03. Registration with City Clerk

1. All charitable organizations soliciting funds ~~or desiring to solicit funds~~ for a charitable purpose in the City of Clearwater ~~shall maintain records, documents~~ and ~~information~~ ~~and~~

shall file a registration statement on forms provided by the City Clerk on or before January 31st of each year. At the time of filing such registration statement, the charitable organization shall pay a registration fee of $10.00. The forms shall contain the following information:

(a) The name of the person registering and desiring to solicit funds for charitable purposes.

(b) Whether the person registering is a natural person, partnership, corporation, or association and,

(i) if a natural person, the business or residence address and telephone number must be given.

(ii) if a partnership, the names of all partners and the principal business address and telephone number of each partner must be given.

(iii) if a corporation, the person registering must state whether it is organized under the laws of Florida or is a foreign corporation, and must show the mailing address, business location, telephone number, name of individual in charge of soliciting funds in Clearwater of such corporation, and the names of all officers and directors or trustees of said corporation, and, if a foreign corporation, the place of incorporation and registration date and certificate to operate in Florida as a foreign corporation.

(iv) if an association, the registration statement shall show the association's principal business address and telephone number, if any, and shall show names and principal business or residence addresses and telephone numbers of the officers and directors or trustees of the association. If the association is part of a multi-state organization or association, the mailing address and business location of its central office shall be given, in addition to the mailing address and business location of its local office.

(c) A reference to all determinations of tax-exempt status under the Internal Revenue Code of the United States and law of any state, and the laws of any county or municipality.

(d) A brief description of the charitable organization registering, the charitable purpose for which the funds are to be solicited, and a brief explanation of the intended use of the funds toward that purpose.

(e) The names, mailing address and telephone number of all individuals authorized to disburse the proceeds of the solicitation.

(f) The names, mailing address and telephone number of all individuals who will be in direct charge or control of the solicitation of funds.

(g) The time period within which the solicitation of funds is to be made, giving the date of the beginning of solicitation and its projected conclusion.

(h) A brief description of the methods and means by which the solicitation of funds is to be accomplished.

(i) An estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds and in connection with their disbursement, and an estimated percentage of the total projected collections which the costs of solicitation will comprise.

(j) The names of any other cities in Florida in which the person registering has ~~solicited~~ collected funds for charitable purposes within the past five (5) years, but in ~~no~~ the event that the person registering has ~~solicited~~ collected funds for charitable purposes in more than five (5) other cities in

Florida, the person registering may list the five (5) cities in Florida in which the most recent ~~solicitions~~ collections occurred.

(k) A statement to the effect that if a Certificate of Registration is granted, such Certificate will not be used as or represented to be an endorsement by the City or any of its officers or employees.

(l) A statement to the effect that the charitable organization will maintain records or documents that are necessary to file the complete statement required by subparagraph 8 of this section and a brief description of those records or documents.

(~~l~~ m) The names of any officer, director, trustee, partner or any current agent or employee engaging in solicitation of funds who has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven (7) years, the nature of the offense, the State in which the conviction occurred, and the year of such conviction.

(~~m~~ n) A brief explanation of the reasons, if the person registering is unable to provide any of the foregoing information, why such information is not available.

(~~n~~ o) The registration statement must be signed by the applicant, if the person registering is an individual; if the person registering is a partnership, by the partner charged with disbursing

funds solicited; if a person registering is a corporation or an association, by its officers charged with disbursing funds solicited. The individual signing the registration statement shall sign the statement and swear before an officer authorized to administer oaths that he or she has carefully read the registration statement and that all the information contained therein is true and correct.

2. After a review of the registration statement to determine its compliance with this section, and within ten (10) working days of the receipt of the registration statement, the City Clerk shall either issue a Certificate of Registration, as provided in this section, or notify the person registering that the registration statement does not

comply with the requirements of this section and specifically point out what information or explanation has not been furnished that is required before a Certificate of Registration will be issued.

3. If for any reason the City Clerk refuses to issue a Certificate of Registration to any charitable organization that has filed a registration statement and the charitable organization disagrees with this decision, the City of Clearwater shall bear the burden of initiating, within ten working days of the denial, a judicial ~~review~~ proceedings ~~in a court of competent jurisdiction to review the City Clerk's administrative decision~~ in the form of a declaratory judgment action pursuant to Chapter 86,

Florida Statutes, to review the City Clerk's refusal to grant a registration certificate. In any such proceeding, the charitable organization seeking the Certificate or Registration shall be considered a party in interest. ~~-----and shall have the absolute right to receive a set of all review papers, to appear by its own counsel, and to submit any and all documents and papers in opposition to the denial of a Certificate of Registration, and shall have the further right to appeal or to join in any appeal from a final adverse judgment or order.~~ The ~~city shall bear the burden of demonstrating in the administrative review that a compelling and substantial governmental interest exists on the record justifying the denial of the Certificate of Regis--~~

~~tration in the specific instance.~~ Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.

4. In such judicial review proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or explanations under this ~~section~~ chapter constitutes a special or unique hardship to the charitable organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense

with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

5. The City Clerk shall prescribe the form of the Certificate of Registration. However, each such Certificate of Registration shall be printed in black except that the following shall be printed prominently thereon in red: "The issuance of this Certificate of Registration is not an endorsement by the City of Clearwater or any of its officers or employees". Nor may the Certificate of Registration be used by any charitable organization for promotion purposes. Each Certificate of Registration shall bear a registration number that is the

~~tration in the specific instance.~~ Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.

4. In such judicial review proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or explanations under this ~~section~~ chapter constitutes a special or unique hardship to the charitable organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense

with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

5. The City Clerk shall prescribe the form of the Certificate of Registration. However, each such Certificate of Registration shall be printed in black except that the following shall be printed prominently thereon in red: "The issuance of this Certificate of Registration is not an endorsement by the City of Clearwater or any of its officers or employees". Nor may the Certificate of Registration be used by any charitable organization for promotion purposes. Each Certificate of Registration shall bear a registration number that is the

same as the file containing the registration statement filed by the registrant.

6. Any charitable organization as defined in Section 100.01(1) that has filed a registration statement with ~~the State of Florida, Pinellas County, or any other municipality or county located in Florida~~ any state, city or county during the preceding twelve (12) months containing substantially the same information under oath as requested in this section and has been issued a registration certificate, may file a copy of such registration statement and registration certificate with the City Clerk and such charitable organization shall be deemed to have complied with the requirements of Section 100.03 relating to the prepara-

tion and filing of a registration statement as long as such prior filing and registration certificate remains valid.

7. All registration statements filed with the City Clerk, whether or not a Certificate of Registration has been issued, shall be a public record and shall be available for inspection by members of the public during regular business hours and copies may be obtained at the regular cost.

8. Within 60 days from the expiration of the Certificate of Registration, the charitable organization shall file with the City Clerk on forms provided by that office a statement regarding all solicitation of funds for the prior year, which statement shall be sworn by an appropriate officer of the charitable

organization and which sworn statement shall show the following: (a) the full amount of ~~funds and/or other property received from the public~~ money and property collected as a result of the solicitation of funds during the ~~previous year~~ annual reporting period; (b) a complete list of any and all expenses incurred in procuring ~~the said~~ those funds. The ~~said~~ list shall be broken down into salaries, wages, fees, commissions, advertising and all other expenses and costs paid in connection with the solicitations of those funds; (c) the bank, if any, where the proceeds of ~~the said~~ those solicitations of funds were placed; and (d) actual or proposed utilization in approximate amounts of the said proceeds.

Section 4. That Section 100.04, Maintenance of Records, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.04. Maintenance of Records.

1. ~~No~~ eCharitable organizations shall ~~fail to~~ maintain records or documents that are necessary to file the complete and truthful ~~registration~~ statements ~~under this chapter~~ required by Section 100.03 for a period of three (3) years from the filing of each statement. ~~Records and documents in this paragraph refer to the information mandated by~~

Section 100.03 and shall be maintained by the charitable organization for a period of (3) three years from registration. A charitable organization, upon the request of the City Attorney in connection with an investigation into possible violations of this chapter, may not refuse to produce information required in the registration statement.

Any charitable organization that is exempt from the provisions of this chapter pursuant to Section 100.02(1) shall not be required to maintain any records or other documents relating to such exemption for more than six (6) months from the date that it solicits or obtains contributions solicited from the public for charitable purposes.

2. If the City Clerk determines that any organization subject to this chapter has failed to maintain documents or records containing information sufficient for the purpose of filing a registration statement, he or she shall notify such organizaton in writing and specify what information it has failed to maintain. If any such organization fails for thirty (30) working days after receipt of notice to provide sufficient evidence of the maintenance of such records and documents without legal excuse, the City Clerk shall declare a default, and such default shall constitute sufficient grounds for the City Attorney to seek and obtain judicial enforcement of this chapter's provisions in a court of competent jurisdiction.

Section 5. That Section 100.05, Prohibited Acts, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.05. Prohibited Acts.

No charitable organization subject to the provisions of this chapter, or no agent, employee, or officer of any such organization shall engage in any of the following prohibited acts:

1. (a) wilful use of any solicited funds or soliciting or retaining funds to support or execute any conduct that is criminal or illegal under

the laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States;

(b) wilful failure to file ~~a registration~~ any statement ~~pursuant to~~ required by this chapter or knowingly making false statements or providing false information ~~with respect to any information or documents provided under the registration requirements of this chapter~~ in those statements;

(c) use of any scheme or artifice to defraud or obtain money or property by means of any false statements or representation;

(d) ~~falsely~~ wilfully concealing the identity of an organization on whose behalf solicitations are being made;

(e) ~~falsely representing~~ knowingly misrepresenting that ~~any contributions~~ the proceeds of any solicitation of funds, under current law, would entitle the donor to a Federal or State income tax deduction;

(f) ~~falsely~~ promising any person that ~~a contribution~~ the proceeds of a solicitation of funds will be refunded upon request, and thereafter willfully failing within 60 days to make a refund that has been requested in writing ~~and within a reasonable period of time~~;

(g) promising any person that refunds of ~~contributions~~ the proceeds of any solicitation of funds will be made upon request without providing such person, at the time such representation

is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section.

(h) soliciting funds at private residences between 11:00 P.M. and 6:00 A.M.;

(i) solicitation of funds by any person on behalf of a charitable organization which has failed to ~~register~~ obtain a Certificate of Registration under this chapter and is not exempt under Section 100.02;

(j) wilful failure to ~~file the records with the City Clerk under this chapter~~ maintain the records or documents required by Section 100.04.

(k) if claiming an exemption under Section 100.02(3), wilful failure to maintain the records or documents required to be maintained by said Section, wilful failure to make the private statement and those records or documents reasonably available for inspection by every member of the charitable organization, or knowingly making false statements or providing false information in the private statement or those records or documents described in said Section.

2. In addition to any other remedy provided by law, any person who wilfully and knowingly commits any of the prohibited acts under this section shall be punishable by a fine not to exceed one

thousand dollars ($1,000.00) or a term of incarceration not to exceed six (6) months, or both.

3. This chapter is not intended to repeal or affect other fraud and consumer protection laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States.

Section 6. That Section 100.06, Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.

1. The City Attorney ~~may~~ shall investigate ~~the solicitation of funds by charitable organizations~~ alleged violations of this chapter only after ten individuals file separate bona fide complaints in writing, sworn to or affirmed, with the City Attorney, setting forth facts demonstrating that one or more of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by such act or acts.

2. ~~For purposes of investigating complaints under this section, the City Attorney shall have the power to apply to a court of competent jurisdiction for a~~

~~subpoena or subpoena duces tecum to bring before him or her any person and to require as part of such subpoena the production of relevant documents and records and to administer oaths and take depositions of any such person so subpoenaed. The City Attorney shall have the power to effect service of process of subpoenas, after approval of such subpoena by a court of competent jurisdiction. The wilful failure of a person without lawful excuse to obey a subpoena or subpoena duces tecum shall constitute a prohibited act under this chapter. This provision does not preempt or supersede any other general laws concerning a refusal to obey a valid subpoena.~~ The City Attorney, when conducting an investigation pursuant to

subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.02(3). and administer oaths.

~~3. In investigating citizen complaints about a charitable organization's solicitation of funds, the City Attorney shall have access to the public records filed by the organization with the City Clerk.~~

~~4~~ 3. ~~The City Attorney may commence and maintain in a court of competent jurisdiction all proper and necessary actions and proceedings to prosecute any act prohibited by this chapter.~~ If the investigation conducted under subpara-

graph 1 demonstrates that probable cause exists to believe that a violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.

Section 7. That Section 100.07, Damages to Injured Persons, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.07. Damages to Injured Persons.

1. Nothing herein contained shall preclude any person aggrieved by a prohibited act under Secton 100.05

~~performed~~ committed by a charitable organization from commencing an appropriate action or proceeding ~~in the Circuit Court~~ under the laws of the State of Florida to recover compensatory damages.

Section 8. That Section 100.08, Notice to the Public About the Provisions of this Chapter, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.08. Notice to the Public About the Provisions of this Chapter.

The City Attorney shall ~~be empowered~~ to inform the public about the requirements of this chapter as applied to all charitable organizations soliciting funds in Clearwater, Florida. The City Attorney specifically has the authority to notify the public that the office is authorized to receive and investigate complaints relating to the violations of this chapter. The City Attorney shall give public notice of all convictions of charitable organizations violating the provisions of this chapter and the basis of these convictions.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 10. Should any part or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not effect the validity of the ordinance as a whole, or any part thereof, other than the part declared to be invalid.

Section 11. This ordinance is adopted as an emergency ordinance, pursuant to Section 166.041(3)(b), Florida Statutes, and the Clearwater City Charter.

Section 12. The City of Clearwater hereby exempts itself from the provisions of Pinellas County Ordinance No. 82-38, and such ordinance shall not apply within the corporate limits of the City of Clearwater, Florida.

Section 13. It is hereby found, determined and declared that this ordinance is necessary and urgently needed for the preservation of the welfare of the citizens and inhabitants of the City of Clearwater, Florida, in that passage of this ordinance is needed to further narrow and refine the provisions of Chapter 100 of the Clearwater Code of Ordinances, which chapter is presently the subject of pending litigation and should therefore be addressed prior to the termination of such proceedings before the trial court, thereby preserving the existing public and compelling interest which calls for the creation of the chapter, and by reason of such fact, an emergency is hereby declared; and this ordinance shall

be in full force and effect immediately upon its passage. This ordinance shall automatically expire ninety (90) days from the date of its passage unless the ordinance is submitted during such time for consideration as a non-emergency ordinance.

Section 14. Notice of the proposed enactment of this ordinance has been properly advertised in a newspaper of general circulation in accordance with Section 166.041, Florida Statutes.

PASSED ON FIRST FIRST READING May 3, 1984

PASSED ON SECOND AND FINAL READING AND ADOPTED May 17, 1984

/s/ Kathleen F. Kelly
Mayor-Commissioner

Attest:

/s/ Lucille Williams
City Clerk